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From: "Obegi, Doug"
Sent: Thur 10/15/2009 11:11:50 PM
Subject: BDCP JPA

Thanks for letting me sit in on the call today. A couple of thoughts to follow up:

A couple places to look for statutory conflicts between existing law and this JPA proposal regarding operations and DWR's legal responsibility to operate the project: Water Code sections 12931, 11451, 12895.

Also seems like their proposal would violate section 3406(b) of the CVPIA (The Secretary shall operate the CVP to meet all obligations under state and federal law, including but not limited to the ESA), Section 103 of the CALFED Bay-Delta Authorization Act, P.L. 108-361 (requiring the Secretary of the Interior and other federal agencies to carry out particular actions), and I'd be willing to be numerous other federal laws (Reclamation Act of 1902?).

It may also be useful to remind the Steering Committee of the *Niobrara River decision* (National Park and Conservation Association (NPCA) v. Stanton, 54 F. Supp. 2d 7 (D.D.C. 1999)), regarding delegation of federal authority. Under the non-delegation doctrine, "Delegations by federal agencies to private parties are, however, valid so long as the federal agency or official retains final reviewing authority." That clearly doesn't happen under their proposal.

The Gutierrez and Kempthorne decisions do provide some useful ammunition regarding the water budget and fishmaster/delegation arguments (although the rulings on the EWA aren't as good as the ruling on the smelt working group and adaptive management, in part because the EWA included an escape clause that required the agencies to prevent take from exceeding permissible take limits regardless of whether there was EWA assets available).

I really like the argument about the illegality of DFG, FWS, and NMFS delegating their Trust authority to an independent fishmaster.

And of course we should be making policy and legal arguments. I'm a little wary of replacing WOMT with a FACA group that invites in outsiders, but it's worth thinking it through.

Also, I hope folks are also raising concerns with section 1.3 – this seems hugely problematic (the contracts and funding limitations run to each individual entity, rather than the whole, so there isn't a single body

responsible – what happens when one party defaults on its obligations? Does only that party lose authority, or the entirety of the BDCP? This is the one area that I think touches on anything outside of water operations... and it's a "bad touch."

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